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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 46–56) and dissenting (R. 56–58) opinions in the circuit court of appeals are reported at 136 F. (2d) 394.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 24, 1943 (R. 59–60). The petition for a writ of certiorari was filed on July 23, 1943, and was granted on October 11, 1943 (R. 62). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the admission in evidence against petitioner at the trial below of his testimony in New York supplementary proceedings in which he was examined as a judgment debtor was a violation of his constitutional privilege against self-incrimination.[1]

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any post office * * * or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 789 of the New York Civil Practice Act (L. 1935, c. 630), prior to March 14, 1938, provided:

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[1] In the petition for a writ of certiorari four other alleged bases for reversible error were advanced, but this Court in granting the writ limited its consideration of the case to the single question stated in the text (R. 62).

> A debtor, party or witness examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud; * * *. But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding, except on a charge or indictment for perjury committed in such examination.

Effective as of March 14, 1938 (L. 1938, c. 108, sec. 17), this statute was amended so as to provide also that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise."

STATEMENT

On August 20, 1940, petitioner was indicted, in the District Court of the United States for the Southern District of New York, on nine counts charging him with having used the mails in execution of a scheme to defraud two classes of persons, in violation of Section 215 of the Criminal Code (18 U. S. C. 338) (R. 1–7).[2] Seven counts

[2] The present printed record is in greatly abbreviated form. However, nine copies of the printed record in the circuit court of appeals were supplied to this Court in connection with the petition for certiorari. In our references the former is designated "R."; the latter "Tr.".

were submitted to the jury (Tr. 1473–1476).[3] Petitioner was found guilty on all of them (Tr. 1509), and he was sentenced to five years' imprisonment on each, the sentences to run concurrently (R. 8, 43).[4] Upon appeal to the Circuit Court of Appeals for the Second Circuit, the conviction was affirmed (R. 46–56, 59–60), one judge dissenting (R. 56–58).

Petitioner did not take the witness stand at the trial, and he contends that the admission in evidence against him of his testimony, given in New York supplementary proceedings in aid of his judgment creditors, on various occasions between March 31, 1936, and September 29, 1939 (R. 12–43), was in effect the equivalent of wringing it from his own lips at the trial within the meaning of the privilege against self-incrimination provided by the Fifth Amendment (Br., pp. 32–33). In order to appraise this contention in the light of the relation of the challenged testimony to the case, we shall set forth at some length the nature of the charges against petitioner and the evidence adduced in support thereof.

The scheme to defraud with which petitioner was charged consisted of "kiting" checks, described by Government witness Robinson as "a

[3] A verdict was directed for petitioner on counts 2 and 4, for the reason that they were based on the same mailings as counts 1 and 3 (Tr. 1475–1476, 474–475).

[4] On two counts, however, the sentence was suspended and petitioner was placed on five years' probation, to begin at the end of the service of his sentences on the other counts (R. 8, 43).

scheme whereby checks are drawn against insufficient funds and the delay in clearing [one] check is taken advantage of by cashing a[nother] check within two or three days, whatever the clearance factor is, and wiring the proceeds to cover the earlier check before arriving at the bank for payment" (Tr. 1166).[6] The two classes of petitioner's intended victims were (1) those whom he would induce to cash checks for him, and (2) those whom he would induce to sign checks in blank and deliver to him (R. 1). While nine victims of the first class were named in the indictment (R. 1) and about 102 more in the Government's bill of particulars (Tr. 14y–14dd), the only mailings alleged with respect to this class of intended victims related to petitioner's transactions with the Essex House (R. 3–4), a New York apartment hotel. Edwin S. Reynolds was the only named victim of the second class (R. 1). Since the only mailings charged were in furtherance of the Essex House and Reynolds transactions (R. 3–7), it was upon these transactions that the Government's case rested. Transactions with other alleged victims (including those with

[6] The meaning of the term "kite" in banking parlance is similarly described by Government witness Moore (Tr. 435–437). That check "kiting," when involving use of the mails, constitutes a violation of the mail fraud statute, see *Federman* v. *United States*, 36 F. (2d) 441 (C. C. A. 7), certiorari denied, 281 U. S. 729; *Lowe* v. *United States*, 115 F. (2d) 596 (C. C. A. 7), certiorari denied, 311 U. S. 717.

Stout & Co., to which most of petitioner's discussion of the relevance of his testimony given in the New York supplementary proceedings after March 14, 1938, is addressed, see Br., pp. 17–23) were significant only insofar as they constituted a part of the same scheme to defraud, or provided evidence of the fraudulent intent with which petitioner's transactions with the Essex House and Reynolds were conducted.[6]

Between October 1935 and October 1936, although living in New York, petitioner maintained a bank account in his own name at the Emmett County State Bank in Harbor Springs, Michigan (R. 12, 32). He frequently cashed checks for large amounts drawn on this account without having funds therein to meet them (Tr. 49–50). They were covered by the cashing of additional checks and wiring of the proceeds in the necessary amount to the bank (Tr. 52, 54, 57–58).[7] On August 10, 1936, when a $5,000 check arrived at the bank with only $147.67 in the account to cover it, the cashier by telephone asked petitioner to close out the account (Tr. 48–53). After the account was closed, checks written by petitioner continued awhile to come in and were protested for nonpayment (Tr. 52, 59–60).

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[6] The trial court so instructed the jury (Tr. 1485–1486).

[7] The Government witness Clarke, cashier of the Emmett County State Bank, testified: "The check would come through the mails in the morning and the check to pay it, the Western Union draft, would be deposited before three

Upon being asked to close out the account in the Emmett County Bank, petitioner, on August 26, 1936, personally opened an account in the name of his father, J. Feldman, of Petoskey, Michigan, in the First National Bank of Petoskey (hereinafter called the Petoskey Bank). When the cashier objected to opening the account for the reason that the bank had had prior experience with checks of J. Feldman drawn on insufficient funds and did not consider him a good credit risk, petitioner stated that he was well able to give his father financial assistance and would guarantee the account, which was thereupon opened with an initial deposit of $1,000 in currency. (Tr. 61–62, 71, 74.) On September 15, 1936, J. Feldman executed an authorization giving petitioner and Alfred B. Frank, who was J. Feldman's son-in-law and bookkeeper (Tr. 156–157), access to the account to the extent of securing information as to its state (Gov. Ex 13, Tr. 65, 1527).

Although thus representing himself in August 1936 as a man of means, petitioner on March 31, 1936, in New York supplementary proceedings brought against him as a judgment debtor, had testified under oath that he was not then employed and never had been employed; that he had no independent income and no business of his own and owned no stocks, bonds, or securities; that he lived on money supplied by members of his

family; and that unpaid judgments against him totaled $150,000 (R. 12–13). In further proceedings of the same character he testified, on October 28, 1936, that he had been in the fur business, but since that business had been bad of late he had virtually given up all fur contacts; that he lived on money borrowed from friends and from his father, brothers, and sisters, who were "fairly wealthy"; and that there were 125 judgments outstanding against him totaling about $340,000 (R. 31–32; Tr. 1288, 1613–1615). By his own admissions, petitioner's judgment debts thus had increased by almost $200,000 between March and October 1936.

From shortly after the opening of the Petoskey Bank account until August 21, 1937 (the period covered by petitioner's transactions with the Essex House), and thereafter from September 1938 until April 1939 (the period covered by his transactions with Stout & Co.), petitioner operated a check "kite" between New York City and the Petoskey Bank (Tr. 1165–1232, 1274–1278). His father would sign checks in blank in Petoskey and mail them to petitioner in New York, where petitioner would fill in the date, payee's name, and amount (Tr. 160; Gov. Ex. 102–B–C, R. 36–39). Between January 1 and August 21, 1937, petitioner cashed these checks in New York in the total amount of $910,842.25 (Tr. 1154). Of this amount $805,593.94 represented checks cashed by the Essex House (Tr. 498, 1170–1177). At no time did the

balance in the Petoskey Bank account equal or exceed the amount of checks drawn and outstanding against it (Tr. 1177–1178). The drawing of each check was predicated upon petitioner's "being able to cash another check and wire the funds to cover the check drawn" (Tr. 1165). The successful operation of the "kite" was predicated in part upon the time factor of four or five days that it took for a check to clear between New York and Petoskey, passing through the Chicago Federal Reserve Bank (Tr. 72, 109, 121, 431–432, 467, 483–484, 1166–1167). When checks were about to arrive at the Petoskey Bank for payment petitioner would communicate by wire or telephone with Alfred Frank, or with the bank, in order to ascertain the amount needed to cover, and would then transmit by wire the proceeds of another check, or a part thereof, to Frank for deposit in the account (Tr. 78, 110–111, 169–171, 173, 176, 194–195, 203, 280–283, 298–299, 304–307, 377). The total amount transmitted by wire between January 1 and August 21, 1937, was $860,930, as against $910,842.25 of checks cashed (Tr. 1159).

Although the Essex House transactions did not reach their peak until August 1937,* petitioner had admitted, in testimony sworn to in New York supplementary proceedings on July 21, 1937, that "I

*During the first 21 days of August checks totaling $141,157.09 were cashed for petitioner by the Essex House (Tr. 1177).

am taking advantage of my father's credit by 'kiting' his checks, to pay off obligations I have incurred, and also meeting the checks I have used of his. * * * I cashed his checks from time to time, and wire the money to him to make the checks good that I have already cashed until such time as I can borrow the money to make good the last one"; that he had been "kiting" for seven months; that he had torn up Western Union receipts for money wired, so as "not to have people know what I am doing"; and that he intended to file a petition in bankruptcy immediately (Gov. Ex. 102-B-C-D-E, Tr. 1287, R-36-43). Although thus intending on July 21 to file a petition in bankruptcy "immediately," he proceeded in the first 21 days of August to draw on insufficient funds checks totaling $150,900 (Tr. 1177).

When on August 21, 1937, the Essex House ceased cashing checks for him, there were in transit to Petoskey for payment 9 checks cashed by it between August 16 and August 20, totaling $30,700 (Tr. 1180). The balance in the Petoskey Bank at the time was $0.24 (Tr. 1178). The 9 checks totaling $30,700 were protested for non-payment (Tr. 480-483). Checks in this group were the subject matter of the mailings of August 20 and 21 alleged (R. 3-4) and proved (Tr. 468-475) under counts 1-4 of the indictment.*

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* On earlier mailings the applicable three-year statute of limitations (18 U. S. C. 582) had run at the time the indictment was filed on August 20, 1940 (R. 1).

A few days thereafter petitioner telephoned Edwin S. Reynolds at Dayton, Ohio (Tr. 596–598), and at petitioner's request Reynolds signed in blank and mailed to petitioner a number of checks on his account in the Winters National Bank and Trust Co. of Dayton, telling petitioner that there was no money in the account and that he should not cash the checks without sending funds to cover them (Tr. 598–601, 663, 667–669). Petitioner, however, filled out four of them, two for $6,000 each and two for $10,000 each, and got William Erb, a broker employed by the New York Stock Exchange firm of Munds, Winslow & Potter, to cash them (Tr. 551–553, 569–577; Gov. Exs. 59–A–B–C, 60–A–B–C, 62, 63, Tr. 589, 573, 1552, 1554). With the proceeds, he took up the $30,700 of unpaid checks cashed by the Essex House (Tr. 1181–1187).

The Reynolds checks were protested for non-payment (Tr. 553, 577–578). They were the subject matter of the mailings of August 23, 25, 26, 27, and 28 alleged (R. 5–7) and proved (Tr. 581–589) under counts 5–9. Erb and Munds, Winslow & Potter, were reimbursed, for the $32,000 given petitioner on the Reynolds checks, by Reynolds' mother, who received from petitioner two notes for $12,000 and $20,000, respectively (Tr. 673–680; Gov. Ex. 86, Tr. 680, 1580; Def. Ex. N, Tr. 1411, 1634). The first was subsequently returned by Reynolds to petitioner (Tr. 1410–1412); the

second, although reduced to judgment, remains unpaid (Tr. 690–691, 695–696, 699–700).

Petitioner's subsequent transactions with Stout & Co. between September 1938 and April 1939 (Tr. 715–984, 1193–1206, 1274–1278) were essentially similar to those with the Essex House. They resulted in a loss to Stout & Co. of $81,500 and the liquidation of that firm (Tr. 770–772).

As we have previously shown (*supra*, pp. 5–6), the Stout & Co. transactions involved no mailing charged in the indictment, and for this reason the jury was correctly instructed (footnote 6, *supra*, p. 6) that a conviction could not be based upon such transactions.

The character of petitioner's testimony given in the New York supplementary proceedings conducted between October 1938 and September 1939 (R. 13–31, 33–35) is set forth in Point II of the Argument, *infra*, pp. 25–35.

SUMMARY OF ARGUMENT

1. Petitioner's testimony given in the New York supplementary proceedings must be divided into two parts, that given before and that given after March 14, 1938, the date on which an immunity statute sufficient to justify the compulsion of otherwise incriminating testimony in the supplementary proceedings first became effective. The earlier testimony is the only part that was incriminating. With respect to it, however, since it was incriminating under state as well as federal law,

and since there was no effective immunity statute, the state privilege would have fully protected petitioner from compulsory disclosure to the state of the incriminating facts; yet with the privilege available, and though represented by counsel, he nevertheless failed to claim it in the state proceedings, and must therefore be deemed to have given the testimony voluntarily. For this reason alone its admission in evidence at the trial below was proper and does not present a question of the admissibility at a federal criminal trial of testimony previously given by the defendant under the compulsion of a state immunity statute.

2. The same is true of the testimony given after March 14, 1938, although for a different reason. That testimony was not incriminating and therefore evoked no privilege against self-incrimination. Furthermore, its effect at the trial was, at the most, merely cumulative, in relation both to the earlier testimony and to the other evidence in the case; and as the majority below held (R. 49–50, 54), petitioner could not have been prejudicially affected by the later testimony alone.

3. Even assuming, however, that all of petitioner's testimony in the New York supplementary proceedings was given under the compulsion of an immunity statute, it was nonetheless admissible in evidence at the trial below. The prior decision of the court below in *Fuller* v. *United States,* 31 F. (2d) 747 (C. C. A. 2), certiorari denied, 280

U. S. 556, is directly in point. That decision in turn was but an application of principles established by decisions of this Court. As applied to a criminal defendant the federal privilege against self-incrimination is satisfied if no federal process compels him to testify or to produce incriminating evidence. Here, moreover, the prior compulsion in the state proceedings was lawfully exerted, with the result that the challenged testimony does not carry even the taint of unlawful state or private action that this Court has held does not preclude the admission of relevant evidence. No suggestion of collusion between the United States Attorney and petitioner's judgment creditors, who instituted the state proceedings, is present in this case; and the possibility of one being trapped "between the interstices of the overlapping state and federal sovereignties," to which the dissenting judge below alludes (R. 57), is in no sense the unique result of an immunity statute. Petitioner in fact is seeking to attribute to an immunity statute a result which, if achieved, would logically extend to situations where no immunity statute is either involved or necessary to secure the testimony, and from which it would follow that the admission in evidence against a criminal defendant of testimony previously given by him in another proceeding is to be regarded as the equivalent in all respects of compelling him presently to testify and therefore never permissible. Petitioner's

contention, if sustained, would cast doubt upon the admissibility in evidence against criminal defendants of various classes of legally required reports, such as income-tax returns, which, like the recorded evidence here involved, are of exceptional trustworthiness; and it would exalt the privilege against self-incrimination, without justification in reason or authority, to a hitherto unattained pinnacle, at the expense of the public interest in the proof of crime by trustworthy evidence legally procured.

ARGUMENT

I

PETITIONER'S INCRIMINATING TESTIMONY GIVEN IN THE NEW YORK SUPPLEMENTARY PROCEEDINGS PRIOR TO MARCH 14, 1938, WAS VOLUNTARY ON HIS PART AND AS SUCH ADMISSIBLE AT HIS TRIAL

The petition for certiorari, and indeed the majority and dissenting opinions below, proceed on the assumption that all of petitioner's testimony in the New York supplementary proceedings was given under the compulsion of a state immunity statute. However, no immunity statute was applicable to the testimony given prior to March 14, 1938, and that testimony included petitioner's only damaging admissions.[10]

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[10] As shown in the Statement (*supra*, pp. 9–10) petitioner, by his testimony given in the supplementary proceedings in July 1937, convicted himself out of his own mouth of having been engaged, for a period of seven months immediately preceding the first of the transactions charged in the indict-

Prior to March 14, 1938, Section 789 of the New York Civil Practice Act (*supra*, pp. 2–3) did not purport to confer immunity from prosecution, but merely provided that the testimony could not be used against the witness in a subsequent criminal proceeding.[11] In this form it was not an immunity statute, and therefore the state constitutional privilege of refusal to answer continued to prevail.[12] The testimony given by petitioner prior to March 14, 1938, was incriminating of fraud under state as much as under

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ment, in the same check "kiting" scheme of which the transactions charged were in furtherance. The entirely different character of the testimony given after March 14, 1938, is discussed in Point II (*infra*, pp 25–35).

[11] Petitioner concedes (Br., pp. 9–11, 24) that the bar of the statute against the subsequent use of the testimony, and its later amendment granting immunity (effective March 14, 1938), would apply only to proceedings in the courts of New York.

[12] The privilege against self-incrimination is provided by Art. 1, Sec. 6, of the New York Constitution. Although originally holding that a statute banning subsequent use of the incriminating testimony in a criminal prosecution of the witness was sufficient to justify compulsion of such testimony (*People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74 (1861)), New York has long followed *Counselman* v. *Hitchcock*, 142 U. S. 547, in holding that such a statute is insufficient because it does not protect the witness from a derivative use of the testimony, and that therefore the privilege may be invoked despite the statute, *People ex rel. Lewisohn* v. *O'Brien*, 176 N. Y. 253 (1903); *People ex rel. Taylor* v. *Forbes*, 143 N. Y. 219, 229 (1894); *People* v. *Buffalo Gravel Corp.*, 195 N. Y. S. 940, 948 (Extraordinary Trial Term, Erie County, 1922); see *Matter of Doyle*, 257 N. Y. 244, 251 (1931).

federal law.[13] He therefore could have made a claim of privilege with the right to have it recognized, on the basis of incrimination under state law.[14] The privilege against self-incrimination is waived by failure to claim it,[15] and petitioner, although at least part of the time represented by counsel in the New York proceedings (R. 21, 41), made no claim of privilege or other objection to the questions that elicited the incriminating answers (see R. 12–13, 31–32, 36–43). It follows that the testimony given prior to March 14, 1938,

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[13] See New York Consolidated Laws (Cahill), c. 41, secs. 921, 925, 932, 938, and New York Penal Law, sec. 1292a. Petitioner asserts that even his testimony given after March 14, 1938, was incriminating under these provisions (Br., p. 22), and must therefore concede their application to the far more damaging testimony given prior to that date.

[14] Cases cited *supra*, footnote 12; cf. *Arndstein* v. *McCarthy*, 254 U. S. 71, 73, holding that Section 7 of the Bankruptcy Act (Act of July 1, 1898, c. 541, sec. 7, 30 Stat. 544, 548; 11 U. S. C. 25), which is similar to the New York statute here involved as it stood prior to March 14, 1938, does not render inapplicable to a debtor's examination in bankruptcy the privilege of refusal to answer provided by the Fifth Amendment; *Ex parte Irvine*, 74 Fed. 954, 963–964 (C. C. S. D. Ohio).

[15] *United States* v. *Murdock*, 284 U. S. 141, 148; *Vajtauer* v. *Commissioner*, 273 U. S. 103, 113; *People* v. *Johnston*, 228 N. Y. 332, 340 (1920); *Great Western Turnpike Co.* v. *Loomis*, 32 N. Y 127, 138 (1865); see, also, *United States* v. *Monia*, 317 U. S. 424, 427; *People* v. *Cassidy*, 213 N. Y. 388, 395 (1915).

must, in contemplation of law, be deemed to have been entirely voluntary.[16]

Petitioner seeks to avoid this conclusion by arguing (Br., pp. 23–26) that since admittedly in the state proceedings he could claim no federal privilege,[17] an attempted assertion of such a privilege would have been a futile gesture, and that therefore his failure to make such a gesture cannot be regarded as a waiver of his rights under the Fifth Amendment. This argument, however, rests upon an artificial and, we submit, wholly fallacious attempt to dissect petitioner's privilege into separate federal and state aspects. In truth, petitioner had just one privilege: the privilege not to be compelled to incriminate himself.[18] As

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[16] *Wilson* v. *United States*, 162 U. S. 613, *infra*, pp. 20–21; *Powers* v. *United States*, 223 U. S. 303; *United States* v. *Block*, 88 F. (2d) 618, 620 (C. C. A. 2); *United States* v. *Mary Helen Coal Corp.*, 24 F. Supp. 50, 51 (E. D. Ky.); 8 Wigmore, *Evidence* (3d ed. 1940), sec. 2276.

[17] The privilege against self-incrimination as provided by the Fifth Amendment, of course, has no application to the states. *Ensign* v. *Pennsylvania*, 227 U. S. 592, 597; *Twining* v. *New Jersey*, 211 U. S. 78, 93; cf. *Palko* v. *Connecticut*, 302 U. S. 319.

[18] The privilege applies only to answers incriminating under the laws of the jurisdiction exercising the compulsion. *United States* v. *Murdock*, 284 U. S. 141, 149; *Dunham* v. *Ottinger*, 243 N. Y. 423, 438 (1926); *Gould* v. *Gould*, 201 App. Div. 674, 194 N. Y. S. 742 (1922); 8 Wigmore, *Evidence* (3d ed. 1940), sec. 2258, pp. 337–341. The answers in this case were incriminating under such laws; see footnote 13, *supra*.

we show below (*infra*, pp. 40–43), the introduction of petitioner's testimony in evidence in the criminal proceeding involves in itself no element of testimonial compulsion. Petitioner's case, even on his own argument, must rest upon the fact that such testimony was initially procured by compulsion. But if, when petitioner testified in the state proceedings, he was under no obligation so to do, but could assert a privilege to refuse, whether bottomed on the state constitution or on any other charter of liberties, then there was no compulsion. Regardless of the source of the privilege, the fact remains that petitioner testified when he was under no legal obligation to do so.

As to this portion of the testimony, therefore, we submit that the New York statute has no relevance, either prior or subsequent to its amendment, and that the admissibility of the testimony is governed by the same rule as that applicable to any ordinary witness who is entitled to assert a privilege against self-incrimination and fails to do so. The rule has been generally stated, "that if a defendant in a criminal case has testified in some other proceeding, such testimony may be used against him as an admission."[19] Under this rule testimony given before a grand jury or coroner's inquest, or in insolvency proceedings, has been held to be admissible against the giver

[19] *Czarlinsky* v. *United States*, 54 F. (2d) 889, 893 (C. C. A. 10), certiorari denied, 285 U. S. 549.

at his subsequent criminal trial.[20] In *Wilson* v. *United States*, 162 U. S. 613, this Court held in a capital case that the testimony of the defendant, given before a United States Commissioner at a preliminary hearing, was admissible against him at his trial although he had not been represented by counsel or informed of his privilege against self-incrimination at the time he gave it.[21] As to

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[20] *Commonwealth* v. *MacKenzie*, 211 Mass 578, 580 (1912); *People* v. *Wieger*, 100 Cal. 352, 358 (1893); *Hendrickson* v. *People*, 10 N. Y. 13, 27–28 (1854); *Abbott* v. *State*, 75 N. Y. 602 (1878); *State* v. *Robinson*, 32 Ore. 43, 51 (1897); *Williams* v. *Commonwealth*, 29 Pa. 102, 105 (1857); *Milton* v. *United States*, 110 F. (2d) 556, 559–560 (App. D. C.); *Boitano* v. *United States*, 7 F. (2d) 324, 325 (C. C. A. 9); *United States* v. *Mary Helen Coal Corp.*, 24 F. Supp. 50, 51 (E. D. Ky.): "The Fifth Amendment affords no immunity to a witness against the use of his voluntary testimony against him." Where a motion to suppress evidence on the ground of alleged illegal search and seizure has been properly denied, the motion papers are admissible at the trial on the issue of ownership of the property that had been seized. *Kaiser* v. *United States*, 60 F. (2d) 410, 413 (C. C. A. 8), certiorari denied, 287 U. S. 654; in accord, *State* v. *Williams*, 69 Oh. App. 361 (1941), appeal dismissed, 139 Oh. St. 172 (1941) (stenographic notes of cross-examination of defendant at hearing on motion to suppress evidence held admissible against him at his trial); but compare *Safarik* v. *United States*, 62 F. (2d) 892, 897–898 (C. C. A. 8), rehearing denied, 63 F. (2d) 369 (C. C. A. 8) (motion papers held inadmissible at trial on issue of ownership where motion to suppress had been sustained on the ground that the search and seizure by federal officers were in fact illegal).

[21] Following *Wilson* v. *United States*, see also *Powers* v. *United States*, 223 U. S. 303; *United States* v. *Block*, 88 F. (2d) 618, 620 (C. C. A. 2) (testimony by the defendant given as a witness called by the prosecution at the trial of an asso-

the testimony given prior to March 14, 1938, we see no material distinction between the facts of that case and of this.

Petitioner seeks to distinguish the *Wilson* case on the ground that there was there "no question of overlapping and different jurisdictions nor of the absence of an exercisable federal privilege at the time the statement was originally made. *Wilson* v. *United States* is merely declaratory of the well established law that a person who *has* a privilege that *can* be exercised but nevertheless *fails* to exercise it, waives it." (Br., p. 25). But this statement points to no distinction. There, as here, whatever privilege the defendant had, he waived. That the privilege which he waived in the present case was afforded him by the state constitution rather than by the federal Constitution cannot be material;[22] in both cases, in fact and in law, his testimony was voluntary.

Petitioner relies upon *Clark* v. *State,* 68 Fla. 443, 436 (1914), which holds without discussion that the admission in a state criminal trial of testimony given by the defendant pursuant to Sec-

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ciate, though under arrest at the time and not warned of his privilege, held admissible against him).

[22] The pungent comment of the dissenting judge below (R. 57) as to the wish "to trap persons between the interstices of the overlapping state and federal sovereignties" loses its aptness when it is recognized that he, like the majority of the court below, mistakenly assumed that the testimony was given under a state immunity statute.

tion 7 of the Bankruptcy Act (11 U. S. C. 25), in an involuntary bankruptcy proceeding, constitutes a violation of the state constitutional privilege against self-incrimination, in that it amounts to "compelling, indirectly at least, the defendant in a criminal case to be a witness against himself."[23] This decision, while concededly supporting petitioner's position, was obviously ill-considered. Section 7 of the Bankruptcy Act provides merely that the bankrupt's testimony shall not be "offered in evidence against him in any criminal proceeding",[24] and does not purport to provide immunity from prosecution. It therefore does not satisfy the demands of the constitutional privilege, which applies in bankruptcy pro-

[23] Of course, the use against a criminal defendant of his own prior admission, whether given in or out of court, may in a sense be said, in every case, to amount to causing him "indirectly at least" to accuse himself. But the privilege against self-incrimination has never been thought to require the abolition in criminal proceedings of the well-settled exception to the hearsay rule that is made for *admissions*. As the court of appeals of Kentucky has aptly said, "The sincerity with which appellant argues this ground is the only excuse meriting its consideration. Of course, this constitutional privilege means that one accused cannot be compelled to give testimony against himself. It does not cover the case where the accused voluntarily makes admissions in or out of court." *Turner* v. *Commonwealth*, 227 Ky. 520, 525 (1929).

[24] Presumably the prohibition applies only to federal criminal proceedings. Cf. *Ensign* v *Pennsylvania*, 227 U. S. 592. In the exercise of the bankruptcy power Congress conceivably might validly prohibit the use of the testimony in state courts.

ceedings despite the statute.[35] Testimony given in bankruptcy proceedings without a claim of privilege thus is legally voluntary, just as is the testimony with which we are here concerned. It follows that *Clark* v. *State*, if consistently applied, would establish a principle by which the receipt in evidence in a criminal case of any prior admission by the defendant would be regarded as compelling him "indirectly at least" to be a witness against himself.[36] Such a principle would completely abrogate the application to criminal proceedings of a well-recognized exception to the hearsay rule, and clearly is not the law. The sweeping character of the court's decision on the facts before it therefore weakens the authority of *Clark* v. *State* as a precedent in support of petitioner's position here.[37]

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[35] *Arndstein* v. *McCarthy*, 254 U. S. 71, 73; cf. *Ex parte Irvine*, 74 Fed. 954, 963–964 (C. C. S. D. Ohio).

[36] See footnote 23, *supra*.

[37] Petitioner states (Br., p. 11) that the majority below "argued that the *Clark* case was not controlling because it presented the converse of the situation at bar." It seems doubtful, however, whether the majority relied on this distinction in disregarding the *Clark* case. The majority said only that it was "not convinced that this decision should control determination of the case at bar" (R. 51). It seems more probable, as implied by the dissenting judge (R. 57), that the majority weighed on its merits the doctrine of the *Clark* case and rejected it as unsound.

State v. *Verecker*, 124 Me. 178 (1924), also cited by petitioner (Br., pp. 9, 13, 29), is of little help to him. While suggesting in *dictum* a possible rule of comity, the court there affirmed the conviction on the ground that the admission

Since petitioner was not in fact compelled to make the incriminating admissions contained in

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of compelled prior testimony was not in any event prejudicial when the defendant had orally given the same testimony on the stand as a witness in his own defense.

Petitioner might also have cited *State* v. *Drew*, 110 Minn. 247, 251–253 (1910), which holds that the introduction, in a state criminal trial, of schedules of assets and liabilities filed by the defendant pursuant to Section 7 of the Bankruptcy Act, in an involuntary bankruptcy proceeding, constitutes a violation of his constitutional privilege against self-incrimination. The court relied upon two federal decisions which held, however, merely that such schedules were protected from use in other federal proceedings by virtue of Section 860 of the Revised Statutes, repealed in 1910 (36 Stat. 352) (for the significance to the present case of this statute and its repeal, see *infra*, pp. 44–46). *Johnson* v. *United States*, 163 Fed. 30 (C. C. A. 1); *Cohen* v. *United States*, 170 Fed. 715 (C. C. A. 4). *State* v. *Drew*, moreover, is directly *contra* to *Commonwealth* v. *Ensign*, 228 Pa. 400 (1910), affirmed in *Ensign* v. *Pennsylvania*, 227 U. S. 592, where this Court held (p. 599) that it is "only the testimony given upon the examination of the bankrupt under clause 9 [of Section 7] that is prohibited from being offered in evidence against him in a criminal proceeding" and not the schedules filed pursuant to clause 8. For holdings that such schedules as distinguished from the bankrupt's testimony are admissible in federal criminal proceedings, see *Slakoff* v. *United States*, 8 F. (2d) 9, 10 (C. C. A. 3); *Optner* v. *United States*, 13 F. (2d) 11, 12–13 (C. C. A. 6); *Czarlinsky* v. *United States*, 54 F. (2d) 889, 893–894 (C. C. A. 10), certiorari denied, 285 U. S. 549. Since Section 7 is not an immunity statute, as to either schedules or testimony (*Arndstein* v. *McCarthy*, 254 U. S. 71), it follows that in a state criminal trial any testimony voluntarily given without a claim of privilege in the bankruptcy proceeding can have no greater sanctity than the schedules, unless by virtue of a possible application to state as well as federal proceedings of the provision of clause 9 prohibiting the subsequent use of the testimony. Such protection as is

his testimony given prior to March 14, 1938, we submit that no circumstances exist to justify, with respect to such testimony, departure from the general rule whereby admissions made in testimony given in other proceedings are receivable in evidence against a criminal defendant.

II

PETITIONER'S TESTIMONY GIVEN IN THE NEW YORK SUPPLEMENTARY PROCEEDINGS AFTER MARCH 14, 1938, WAS NOT IN FACT INCRIMINATING AND WAS THEREFORE NOT PRIVILEGED, AND ITS ADMISSION AT HIS TRIAL WAS NOT PREJUDICIAL

Effective March 14, 1938, Section 789 of the New York Civil Practice Act was amended [28] so as to make it a true immunity statute, broad enough to legitimatize compulsion of petitioner's testimony without infringing his privilege not to be forced to incriminate himself. We contend, however, that his testimony given after March 14, 1938, was not in fact incriminating, and that therefore it evoked no privilege which he could assert either in the state proceedings or in the instant criminal case, even in the absence of an immunity statute. As a result, we submit, the later testimony—like the earlier, although for a different reason—was not in fact given under the protection of any immunity statute, and was admissible.

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afforded to the testimony after it is given derives solely from the statute and not from any state or federal constitutional privilege.

[28] Laws, 1938, c. 108, sec. 17 (*supra*, p. 3).

Petitioner suggests (Br., pp. 17–19) that the incriminating character of the testimony must be deemed concluded by the fact that the Government introduced it in evidence against him at the criminal trial. This argument, however, proves too much. Its consequence would be that the extent of the privilege available at a hearing to which an immunity statute applies would be tested not by the rules applicable to an ordinary witness, but by those applicable to a defendant already charged with a specific crime. The witness would in effect have the privilege of a criminal defendant, not merely to refrain from incriminating himself, but not to be called upon to testify at all, to any facts.[29] As this Court said in *Heike* v. *United States,* 227 U. S. 131, 141, dealing with a similar claim: "At times the argument seemed to suggest that any testimony, although not incriminating, if relevant to the later charge, brought the amnesty into play." In fact, a logical consequence of the argument would be to exclude all prior admissions of a defendant from evidence at his trial for crime, regardless of the circumstances under which the admissions were made. This is not, and should not be, the law.

Rather, we submit, the incriminating character of petitioner's testimony is to be determined in the light of the conditions existing at the time the testimony was given, and by the rules applicable

[29] 8 Wigmore, *Evidence* (3d ed. 1940), secs. 2260, 2268.

to an ordinary witness called upon to testify in a judicial proceeding. Such a witness has no privilege against testifying merely because his testimony may possibly have some remote relevance to a later criminal charge. All kinds of testimony considered by no one to be incriminating when given, and therefore not privileged, may subsequently provide background material for proof of crime. To be privileged, and therefore protected by an immunity statute when given, the testimony must constitute an essential link in the proof of crime, or give "reasonable ground to apprehend danger to the witness from his being compelled to answer."[30] Otherwise, an immunity statute

[30] That such characteristics are essential to render privileged the answers of a witness not charged with crime, see *Regina* v. *Boyes*, 1 Best & S. 311, 321 (1861); *Aaron Burr's Trial*, Robertson's Rep. I, 208, 244, 25 Fed. Cas. No. 14,692e at 38–39 (1807); *State* v. *Thaden*, 43 Minn. 253, 255–256 (1890); *Mason* v. *United States*, 244 U. S. 362, 364–366; *Matter of Doyle*, 257 N. Y. 244, 267 (1931); *People* v. *Kramer*, 14 N. Y. S. (2d) 161, 163 (Appellate Division, Fourth Department, 1939); *People ex rel. Coyle* v. *Truesdell*, 18 N. Y. S. (2d) 947, 951 (Appellate Division, Second Department, 1940); 8 Wigmore, *Evidence* (3d ed. 1940), secs. 2260, 2271.

In *Heike* v. *United States*, 227 U. S. 131, 144, where the non-incriminating character of the testimony was determined retroactively, after the criminal proceeding had been instituted, Mr. Justice Holmes said of the immunity statute there involved: "When the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law."

would confer a sweeping immunity from criminal prosecution upon a witness who so much as opened his mouth in a proceeding to which the immunity statute applied. This danger is particularly apparent where the immunity statute, as is the case here, does not require that the immunity be claimed and granted as a condition precedent to its being secured.[21]

Accordingly, we submit that the question whether petitioner's testimony given after March 14, 1938, was in fact incriminating, and as such compellable only by virtue of the state immunity statute, is to be determined as of the time the testimony was given. And we submit that there is nothing in petitioner's testimony given after March 14, 1938, that could, as of the time it was

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[21] Cf. *People* v. *Buffalo Gravel Corp.*, 195 N. Y. S. 940 (Extraordinary Trial Term, Erie County, 1922). Section 2446 of the Penal Law (Consolidated Laws of New York (Cahill), c. 41, § 2446) provides for written waivers of the benefits of any immunity statute in New York; but of course a witness does not acquire an immunity unless he gives incriminating testimony. *People ex rel. Bekoris* v. *Triesdell*, 21 N. Y. S. (2d) 7 (App. Div., Second Department, 1940); *People* v. *Lorch*, 13 N. Y. S. (2d) 155, 160–161 (Court of General Sessions, New York County, 1939).

The principle that under such statutes the immunity need not be claimed should not be confused with the principle, relied on in our argument under Point I (*supra*, pp 16–18), that, absent a true immunity statute, the privilege must be claimed or is deemed to have been waived. See *United States* v. *Monia*, 217 U. S. 424, 427.

given, reasonably have been deemed to be incriminating, either under New York or federal law.[32] Nothing therein admitted, directly or indirectly, the commission of any criminal offense, or provided any necessary element or link in the proof thereof.[33] Nothing therein provided reasonable ground for apprehension of a criminal proceeding being instituted;[34] and petitioner does not suggest that the institution of the present proceeding was the result, either directly or indirectly, of his testimony given in the New York supplementary proceedings.[35] All the later testimony (that given

[32] Since the state privilege against self-incrimination has no application to incrimination of a federal offense alone (see cases cited in footnote 18, *supra*, p. 18), it would seem that technically the only question was whether such testimony was incriminating under New York law. However, even if it were held that testimony incriminating under federal law but given in a state proceeding was inadmissible in a later federal criminal case, petitioner would not be aided since, as we show in the text, the testimony given after March 14, 1938, was not incriminating under either state or federal law.

[33] See *People ex rel. Coyle* v. *Truesdell*, 18 N. Y. S. (2d) 947, 951 (Appellate Division, Second Department, 1940), and other cases cited in footnote, 30, *supra*, p. 27.

[34] See *People* v. *Kramer*, 14 N. Y. S. (2d) 161, 163 (Appellate Division, Fourth Department, 1929), and other cases cited in footnote 30, *supra*, p. 27.

[35] Cf. the comment of this Court, in *United States* v. *Murdock*, 284 U. S. 141, 149, dealing with the converse situation: "The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect of federal matters."

after March 14, 1938) shows is that he was without means of his own and lived entirely on money borrowed from his father and other members of his family or from friends; that his father paid the rent for his apartment and sent him checks drawn on the First National Bank of Petoskey, Michigan; that he had never sent money or checks to his father's account in Petoskey;[36] that in 1935 and 1936 he had maintained a brokerage account with Harriman & Keech in the name of Joseph Little, and that in 1937 he had maintained another brokerage account with Munds, Winslow & Potter that resulted in an $8,000.00 loss; that between January and April of 1939 he was in Florida; that while there he lived and had his meals in the office suite of Stout & Co., which paid all his expenses; that he was there as a friend of Miller, a partner in the firm; and that he had no business transactions while in Florida (R. 13–31, 33–35).

His testimony that he had no funds or property of his own and lived entirely on borrowed money

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[36] A part of this testimony was inconsistent both internally and with other evidence in the case, and may well have amounted to perjury on the part of petitioner. But it was not introduced for the purpose of showing perjury; and in any event it would not in that aspect have fallen within the scope of the state immunity statute. *People* v. *Reiss*, 8 N. Y. S. (2d) 209 (Appellate Division, First Department, 1938), affirmed 280 N. Y. 539 (1939); *People* v. *Kramer*, 14 N. Y. S. (2d) 161 (Appellate Division, Fourth Department, 1939); cf. *People* v *Keylon*, 122 Cal. App. 408, 412–413, 10 P. (2d) 86, 87 (1932).

showed at the most a financial motive for the criminal conduct charged against him. Yet if for this reason alone it is to be deemed incriminating, it would follow that any one of millions of individuals could secure immunity from prosecution for crimes of fraud, larceny, or robbery, by merely testifying to indigence and dependence in judgment debtor proceedings such as those here involved. His testimony that he at one time maintained a brokerage account in the name of Joseph Little, credit manager of the Essex House, in no way proved any element of a crime charged against him, but merely indicates his closeness to Little, a point emphasized by petitioner himself at the trial in disproof of the charges against him involving the Essex House. His testimony that he spent a winter in Florida as the guest of Stout & Company likewise contains not the slightest suggestion of a fraud upon that concern, but merely indicated his friendship with a partner therein, a point also emphasized by him at the trial in disproof of the charge of fraud. (This is illustrated by his statement in the brief on the merits that the alleged knowledge of the victims made each of them "a willing participant with the defendant in the transactions." (Br. pp. 4–5.) His testimony that his father sent him checks drawn on the First National Bank of Petoskey, Michigan, contains not the slightest indication that such checks were drawn on insufficient funds or that he was engaged in "kiting" them.

Petitioner seeks to avoid the effect of this conclusion as to the nature of his testimony by arguing that the testimony was used at the criminal trial as part of the Government's attempt to "establish the crime charged against the defendant as to Stout & Co.," by proving "a fraudulent scheme on the petitioner's part to issue, and then have Stout & Co. cash, a large number of checks, as well as [proving] the petitioner's inability and lack of power *at that time* to have such checks paid upon their arrival at the bank on which they were drawn" (Br. p. 18). In support of his contention he sets out in the Appendix to his Brief (Br. pp. 39–44) various isolated portions of the testimony, with interlineations to indicate their supposed relevance to his fraud on Stout & Co. The first difficulty with this argument is that there *was* no "crime charged against the defendant as to Stout & Co." The mailings charged—on the basis of which alone petitioner could have been convicted—related exclusively to fraud on Essex House and on Reynolds, and all occurred a year or more before the transactions with Stout & Co. Indeed, the Government was inferentially criticized by the court below for burdening the record with testimony so remote from the only crimes charged.[37]

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[37] "Why the Government thought it necessary or desirable so greatly to lengthen the trial by the introduction of a mass of evidence relating to similar transactions we find difficult to understand in view of the completeness of its proof as to

Furthermore, even were the testimony as relevant as petitioner contends to the crimes charged in the indictment, it would still remain testimony which, at the time and under the circumstances of its original utterance, was in no sense incriminating. To hold that the introduction of such testimony in a later criminal case was precluded by the force of the immunity statute would entail as a logical corollary a holding that petitioner, by giving it, had secured immunity not merely from the use of the testimony, but from any prosecution at all on account of matters connected with it, at least in New York. We submit that no immunity statute can reasonably be given an effect so disastrous to criminal justice, and that petitioner's testimony given after March 14, 1938, involved no privilege for an immunity statute to avoid. It therefore was not compelled by virtue of any such statute, and the premise of petitioner's argument against its admissibility at the trial below must fail.

In any event, as we have already shown (*supra*, pp. 9–10), by his testimony voluntarily given prior to March 14, 1938, petitioner had convicted himself out of his own mouth of having been engaged, for seven months prior to July 1937, in the same

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the Essex House and Reynolds transactions." (R. 49). As pointed out in the Statement, *supra*, p. 6, the jury at the trial was properly instructed that no conviction could be based upon the Stout & Co. transactions (Tr. 1485–1486).

check "kiting" scheme of which the transactions charged in the indictment were in furtherance. That testimony, as shown in Point I, was clearly admissible at his trial; and the significance of the admission of the later testimony was merely its cumulative effect, in relation both to the earlier testimony[28] and to the other evidence properly admitted at the trial. Consequently, even if the

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[28] Petitioner contends (Br. pp. 18–19) that the later testimony cannot be regarded as cumulative in relation to the earlier for the reason that it concerned a later period of time, and also because it was taken, for the most part, in proceedings brought by entirely different judgment creditors. That might be true if it were being used for the same purposes as those for which it was elicited in the New York proceedings. But the cumulative character of the later testimony in respect of its use at the trial below is to be determined by reference to the purpose for which all the testimony was adduced at the trial below, and as of the time of the trial. The earlier testimony was not introduced for the purpose of enabling the jury to convict petitioner of the criminal conduct which such earlier testimony admitted, since the statute of limitations had run upon a prosecution for that conduct (*supra*, footnote 9, p. 10). It was introduced for its bearing upon the intent with which petitioner committed the acts charged in the indictment, which occurred in August 1937. The later testimony was introduced for exactly the same purpose. In view of the clear admissions contained in the earlier testimony, and of the other evidence set forth in the Statement (*supra*, pp. 6–12), the later testimony standing by itself could have added nothing, we submit, by which the jury conceivably could have been influenced in finding guilt. It was therefore merely cumulative in character.

Petitioner also contends (Br., pp. 20–21) that the giving of the earlier testimony did not serve as a waiver of constitutional immunity in respect of the later testimony. We have made no argument inconsistent with this view.

later testimony is regarded as incriminating, its admission at the trial could not have been prejudicial. The majority below therefore correctly concluded that, his earlier incriminating testimony having been properly admitted, his "later statements of October 1938 to September 1939 became mere cumulative reiteration of matters already abundantly proved, and cannot have had any substantial effect on the jury's verdict" (R. 54).[39]

III

EVEN THOUGH REGARDED AS COMPELLED BY AN IMMUNITY STATUTE, ALL OF PETITIONER'S TESTIMONY GIVEN IN THE NEW YORK SUPPLEMENTARY PROCEEDINGS WAS NEVERTHELESS ADMISSIBLE AT HIS TRIAL

In Point I we have shown that petitioner's testimony given prior to March 14, 1938, although incriminating under state law, was not given pursuant to an immunity statute, since there was no such statute then applicable; and that, with the privilege against self-incrimination therefore available to him, he nevertheless did not assert it, and as a result must be deemed to have

[39] See also *People* v. *Boyd*, 67 Cal. App. 292, 297, 227 Pac. 783, 784 (1924): "The testimony of the defendant given upon the first trial contains no confession or admission tending to establish guilt. The introduction of the testimony to which objection is so strenuously made would seem to have served no useful purpose, and should therefore probably not have been admitted; yet, since it cannot be said to have been harmful to the rights of the defendant, it will not be a ground for reversal."

given his testimony voluntarily. In Point II we have shown that his testimony given after March 14, 1938, was not in fact incriminating and therefore evoked no privilege, so that the immunity statute which became effective on March 14, 1938, was as irrelevant to the later as to the earlier testimony. In Point II we have also shown that, in any event, the later testimony, viewed in its relation to the offenses of which petitioner was convicted, was merely cumulative and did not prejudice his substantial rights. We submit that the decision below should be affirmed upon these grounds, and that this case presents no question of the admissibility at a federal criminal trial of incriminating testimony compelled under a state immunity statute.

For the purpose of meeting directly petitioner's contentions, however, we shall assume, *arguendo*, that such a question is presented. On this assumption we submit, despite the comments of petitioner (Br. pp. 11–12, 13) and of the court below (R. 51, 52, 53) on the absence of controlling authority, that the unanimous decision of the same court in *Fuller* v. *United States*, 31 F. (2d) 747 (C. C. A. 2), certiorari denied, 280 U. S. 556, effectively disposes of petitioner's contentions here.

The defendant in the *Fuller* case had been required, by subpoena issued by the Attorney General of New York *pursuant to a statute con-*

taining a true immunity clause,[40] to produce books and records which belonged to him individually.[41] Except as affected by the state immunity statute he was protected by the state constitutional privilege against self-incrimination from being compelled to produce such books and records;[42] and he was likewise protected by the Fifth Amendment from any such compulsion at the hands of the United States.[43] The United States subpoenaed the books from the possession of the state Attorney General for use in a mail fraud prosecution of the defendant. The defendant there, like petitioner here, did not take the stand at his trial, and contended that the admission of the books in evidence was a violation

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[40] Consolidated Laws of New York (Cahill), c. 21, § 359. The fact that this statute under which the books and records were subpoenaed contained an immunity clause does not appear in the reported opinion of the circuit court of appeals (31 F. (2d) 747); but it was brought to the attention of this Court in the petition for certiorari (No. 920, October Term 1928), which was denied (280 U. S. 556).

[41] Other books and records belonging to a corporation of which the defendant was treasurer were held not privileged, on the authority of *Wilson* v. *United States*, 221 U. S. 361.

[42] *People* v. *Hunter*, 249 N. Y. S. 66, 68 (Court of General Sessions, New York County, 1931); see *People* v. *Defore*, 242 N. Y. 13, 27 (1926): "A defendant is 'protected from producing his documents in response to a *subpoena duces tecum*, for his production of them in court would be his voucher of their genuineness.' There would then be 'testimonial compulsion' (*Haywood* v. *U. S.*, *supra* [268 Fed. 795, 802 (C. C. A. 7), certiorari denied, 256 U. S. 689])."

[43] *Boyd* v. *United States*, 116 U. S. 616, 618.

of his privilege against self-incrimination under the Fifth Amendment. The court, unanimously rejecting this contention, stated (31 F. (2d) at 748):

> All of these books and papers, however, were in the possession of the Attorney General of New York when they were taken by the government on subpoena. The privilege of the defendant was not broad enough to protect him from the production by others of his private books or papers, when they were found in the possession of a third party; but only prevented the voluntary production of them by himself while he had custody of them.

The case at bar is of course not to be distinguished on the ground that it involves oral disclosures rather than books or documents, since the federal and New York constitutional provisions alike embrace both forms of compelled incrimination.[14] The *Fuller* case involved all the elements that petitioner, in contending that his testimony was inadmissible, assumes are present here: (1) evidence of a type which in the absence of an immunity statute would be protected by the state constitutional privilege against self-incrimination, and which would be similarly protected by the Fifth Amendment were it applicable to the proceeding in which the evidence was elicited; (2) an

[14] Cases cited in footnotes 42 and 43, *supra*, p. 37.

immunity statute, authorizing compulsory production of the evidence in the state proceeding; and (3) use of the evidence at a federal criminal trial. In both cases the defendant objected to the use of the evidence at his federal criminal trial, but in both cases the evidence was introduced without the aid of any federal process compelling him either to testify to the incriminating facts or to produce the incriminating evidence.

The decision in the *Fuller* case was a direct application of principles established by decisions of this Court. This Court has extended the protection of the Fifth Amendment beyond that of the common-law privilege against self-incrimination, by holding that it is not limited to oral disclosures but also forbids compelling a person to produce self-incriminating documents belonging to him and in his possession.[45] But this Court has refused to extend the protection of the Amendment any further than this, and has held that by the Amendment a party "is privileged from producing the evidence but not from its production."[46] Thus, the title to and possession of incriminating books and papers of a bankrupt may be transferred, by operation of laws containing no immunity clause, to the trustee in bankruptcy, and they may in turn be procured from the trustee by

[45] *Boyd* v. *United States*, 116 U. S. 616, 618.

[46] *Johnson* v. *United States*, 228 U. S. 457, 458.

compulsory process for use as evidence in a criminal prosecution of the bankrupt, without violating the bankrupt's constitutional privilege under the Fifth Amendment.[47] This result being permissible where the whole of the procedure occurs in tribunals subject to the Fifth Amendment, it cannot seriously be contended that the result should be otherwise when the initial transfer was by operation of the laws of a state having a substantially identical constitutional privilege.[48] The *Fuller* case, thus strongly buttressed by decisions of this Court, is consistent with the essential nature of the privilege against self-incrimination.

That privilege applies primarily to *present testimonial* compulsion.[49] This statement of limitation upon its normal application does not mean that a government may reap the benefit of an antecedent violation of the privilege by its own tri-

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[47] *Ex parte Fuller*, 262 U. S. 91, 93–94; *Johnson* v. *United States*, 228 U. S. 457, 458; *Matter of Harris*, 221 U. S. 274, 279–280. It is sufficient that the bankrupt has been divested of possession; that he retains title is insufficient to preserve the privilege. *Dier* v. *Banton*, 262 U. S. 147, 149–150.

[48] In *Dier* v. *Banton*, 262 U. S. 147, involving somewhat the converse situation, this Court affirmed an order refusing to enjoin the receiver of the estate of a bankrupt from delivering books and records to a state District Attorney pursuant to a state subpoena.

[49] 8 Wigmore, *Evidence* (3d ed. 1940), p. 363; *Regina* v. *Scott*, Dearsly & Bell's Crown Cases 47, 59 (1856); *Haywood* v. *United States*, 268 Fed. 795, 802 (C. C. A. 7), certiorari denied 256 U. S. 689; *People* v. *Defore*, 242 N. Y. 13, 27 (1926).

bunals.[50] Where, however, there has been no such antecedent violation, but only lawful compulsion, the privilege has no application to the use against a defendant of his prior testimony, as distinguished from compelling him presently to testify. In England it was so decided nearly a century ago. The defendant in *Regina* v. *Scott,* Dearsly & Bell's Crown Cases 47 (1856), had been examined in bankruptcy pursuant to Section 117 of the Bankrupt Law Consolidation Act of 1849 (12 & 13 Vict., c. 106). A transcript of his testimony so given was admitted in a later criminal prosecution for mutilating one of his trade books. On the appeal it was held that, notwithstanding the common law privilege against self-incrimination, the statute lawfully required the bankrupt to answer relevant questions touching "his trade, dealings, or estate, although the answer may tend to show that he has concealed his effects, or been guilty of any other offence connected with his bankruptcy" (*ibid.,* 56). Consequently, the transcript was held admissible. Speaking for the court Lord Campbell, C. J., stated (*ibid.,* 59):[51]

> The accusation of himself was an accomplished fact, and at the trial he was

[50] *Tuttle* v. *People*, 33 Colo. 243 (1905); *State* v. *Young*, 119 Mo. 495 (1894); *State* v. *Hoffman*, 53 S. D. 182 (1928); see *Regina* v. *Scott*, Dearsly & Bell's Crown Cases 47, 59 (1856). *Regina* v. *Garbett*, 2 Carrington and Kirwan 474 (1847), relied upon by petitioner (Br., pp. 27–28), merely applies this principle.

[51] Coleridge, J., dissented (*ibid.*, pp. 60–67).

> not called upon to accuse himself. 'The maxim relied upon ["*nemo tenetur se ipsum accusare*"] applies to the time when the question is put, not to the use which the prosecutor seeks to make of the answer when the answer has been given. If the party has been unlawfully compelled to answer the question, he shall be protected against any prejudice from the answer thus illegally extorted; but a similar protection cannot be demanded when the question was lawful and the party examined was bound by law to answer it.

To a further argument that the testimony constituted a coerced confession and as such was inadmissible in evidence, Lord Campbell replied (*ibid.*, 58):

> It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon. Such an objection cannot apply to a lawful examination in the course of a judicial proceeding.

Regina v. *Scott* represents the present law of England,[52] and we submit that its doctrine is ap-

[52] *Regina* v. *Robinson* (1867), L. R. 1 C. C. 80, 10 Cox Cr. 467; *Regina* v. *Erdheim* (1896), 2 Q. B. 260, 267; 3 Wigmore, *Evidence* (3d ed. 1940), p. 310. See also *Rex* v. *Harcourt*

plicable here. The common law privilege against self-incrimination in that case controlled the criminal proceeding at which the incriminating testimony was offered in evidence as much as the Fifth Amendment controlled the trial in the present case. In *Regina* v. *Scott* the court, not invading but upholding the privilege, held that the incriminating testimony was admissible since it was originally compelled lawfully. In this case, the incriminating testimony, if compelled at all in the state proceedings, was likewise compelled lawfully. The lawfulness of the prior compulsion, on which the decision in *Regina* v. *Scott* turned, is as clearly present here as it was there.[53]

(1930), 3 D. L. R. 59, 62 (Ontario Supreme Court, 1929) (the principle "that no one is bound to accuse himself * * * is directed to the fact of the giving of the evidence and not to the use which may be afterwards made of that evidence on subsequent proceedings"); *Rex* v. *Graham*, 21 D. L. R. 513 (Alberta Supreme Court, 1915).

[53] Indeed, the use of the testimony at the trial below did not carry even the taint of unlawful state or private action which this Court has held does not preclude the admission at a federal trial of evidence secured by an unconstitutional search and seizure committed by state officers, or secured by the trespass of private individuals. *Weeks* v. *United States*, 232 U. S. 383, 398; *Burdeau* v. *McDowell*, 256 U. S. 465; *Byars* v. *United States*, 273 U. S. 28, 33: "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account." *McGuire* v. *United States*, 273 U. S. 95, 99; *Schroeder* v. *United States*, 7 F. (2d) 60 (C. C. A. 2); *United States* v. *One Ford Coupe*, 3 F. (2d) 64 (W. D. La.); cf. *Olmstead* v. *United States*, 277 U. S. 438; and see *Gambino* v. *United States*, 275 U. S. 310, 317.

We believe that the scarcity of directly controlling authority is attributable to the fact that between 1868 and 1910 a federal statute forbade the use against a defendant in federal criminal proceedings of any pleadings or evidence obtained from him "by means of a judicial proceeding in this or any foreign country,"[54] and to the further fact that courts, legislatures, and the bar alike have taken it for granted that testimony of the character here involved is admissible in evidence in the absence of such a statutory prohibition. The statute referred to was never supposed to be a mere declaratory statement of the constitutional privilege against self-incrimination. Instead, it was part of the one-time trend of Congress and numerous state legislatures to restrict the privilege by providing in its place that compelled incriminating testimony may not be used against the witness in a criminal prosecution.[55] Some courts had held that statutes of

[54] Act of February 25, 1868, 15 Stat. 37 (R. S. 860); repealed by Act of May 7, 1910, c. 216, 36 Stat. 352.

[55] In recommending its repeal the Attorney General in his Annual Report for 1909, pp. 22–23, stated: "In the enactment of this section it was the apparent intention of Congress to create a law which would enable prosecutors to give immunity to witnesses who were compelled to testify against themselves, but the Supreme Court, in the case of *Counselman* v. *Hitchcock* (142 U. S. 547) held that this section was no substitute for the constitutional guaranty against self-incrimination. As a result it is availed of constantly by criminals to prevent the Government from using against them any testimony given by them at any time in any proceeding. * * *" See also the discussion in the dissenting opinion in *United States* v. *Monia*, 317 U. S. 424, 432–442.

this sort provided an adequate substitute for the privilege, and therefore justified the compulsion of otherwise incriminating testimony.[56] But since the decision of this Court in *Counselman* v. *Hitchcock*, 142 U. S. 547, it has been accepted that such statutes not only do not meet the needs of the constitutional privilege against self-incrimination, but serve themselves as stumbling blocks to the effective and fair administration of criminal law.[57] Yet if petitioner's argument is sound—i. e. that even lacking such a statute incriminating testimony compelled in one jurisdiction is inadmissible in a criminal trial in another—it would follow not only that the Act of 1868 was unnecessary when enacted, rather than inadequate as held by this Court in *Counselman* v. *Hitchcock*, 142 U. S. 547, but also that Congress was misled as to the reasons for repealing it.[58] While recog-

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[56] *State* v. *Quarles*, 13 Ark. 307 (1853); *People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74 (1861) (overruled in *People ex rel. Lewisohn* v. *O'Brien*, 176 N. Y. 253 (1903), in conformity with *Counselman* v. *Hitchcock*, 142 U. S. 547).

[57] The statute was repealed because it "possessed no usefulness whatever, but has remained in the law as an impediment to the course of justice." See H. Rep. No. 266, 61st Cong., 2d sess., pp. 1–2; see also S. Rep. No. 502, 61st Cong., 2d sess.; 45 Cong. Rec. 2251–2253, 5764–5765.

[58] That is, from petitioner's contention it would follow that R. S. 860, as applied to previously compelled testimony, would have been declaratory of the constitutional requirement, and that its repeal would have left the latter unaffected. It may be argued that the repeal may still have sufficient significance as applied to testimony voluntarily given in a prior proceeding. But from petitioner's premise that his

nizing that change and growth in constitutional doctrine are both appropriate and essential, we nevertheless submit that this constitutional provision should not be invested with a meaning which is so contrary to the basic assumptions of both courts and legislatures throughout our constitutional history.[39]

In fact petitioner is seeking to attribute to an immunity statute a result which, if achieved, would logically extend to situations where no immunity statute is either involved or necessary to secure the testimony. For by hypothesis testimony that when given is not incriminating, or else is incriminating only in such a remote sense as not to evoke any privilege, is compellable by both state and federal governments without the aid of immunity statutes; and testimony that is incriminating only under the laws of another government is likewise compellable without the aid of such a statute. A premise of petitioner's

testimony was involuntary because he was unable to claim his federal privilege in the state proceedings, it would follow that incriminating testimony given in a state proceeding is never to be regarded as voluntary when offered in evidence at a federal trial. We therefore believe that it is a necessary implication of petitioner's position that both the enactment and the repeal of R. S. 860 were based on a complete misunderstanding of the privilege against self-incrimination.

[39] See William Howard Taft, *The Administration of Criminal Law*, 15 Yale L. Journ. 1, 8–11 (1905); *Model Code of Evidence* (American Law Institute, 1942), Foreword by Edmund M. Morgan, p. 23; Rule 201 (3) and Comment; Rule 233 and Comment.

reasoning is that he was unable to assert his federal privilege in the state proceedings, and that the first time he was in a position to do so was at the trial below (Br., p. 24). Yet this would still be true had no state immunity statute been involved; and the situation of one being trapped "between the interstices of the overlapping state and federal sovereignties" is in no sense the unique result of an immunity statute. It may arise between state and federal governments although neither should have such a statute; it is paralleled by the situation with respect to a bankrupt's books and papers that may exist under the laws of a single sovereignty (*supra*, pp. 39–40); and it may be paralleled wherever one state seeks to make use of testimony given under the compulsion of the laws of another state whether with or without the aid of an immunity statute.[60] As

[60] Indeed, such a result is a necessary corollary of the rule that the privilege against self-incrimination applies only to answers which are incriminating under the laws of the jurisdiction exercising the compulsion. See cases cited *supra*, in footnote 15. Petitioner contends that the present case represents the actual occurrence of what this Court regarded as a remote possibility in *Brown* v. *Walker*, 161 U. S. 591, and in *Jack* v. *Kansas*, 199 U. S. 372 (Br., pp. 10, 11). However, the controlling decision is *United States* v. *Murdock*, 284 U. S. 141, 148, in which this Court did not base the rule in question upon the remoteness of the possibility of prosecution under the laws of another jurisdiction. In view of the multitude of acts which may constitute criminal conduct under the laws of other jurisdictions, which are not within the judicial knowledge of the court taking testimony, we submit that no other rule than that recognized in *United States* v. *Murdock* is practicable.

already pointed out, all kinds of testimony, considered by no one to be incriminating when given, may subsequently provide background material for proof of crime. In short we believe that petitioner's contentions, though premised on the assumption that his testimony was compelled by an immunity statute, are necessarily of much broader application and involve a proposition that the admission in evidence against a criminal defendant of testimony previously given by him in another proceeding is the equivalent in all respects of compelling him presently to testify, and is therefore never permissible.

Moreover, to accept petitioner's contention would cast doubt upon the admissibility in evidence against criminal defendants of various classes of legally required reports, such as income tax returns,[61] which are not even the product of testimonial compulsion and yet, like the recorded evidence here involved, are of exceptional trustworthiness. The privilege against self-incrimination has not been interpreted to forbid the compelled production of all evidence that conceivably may prove useful in a criminal prosecution. It has not been interpreted to excuse people from

[61] Held admissible in *Shushan* v. *United States*, 117 F. (2d) 110, 117 (C. C. A. 5), certiorari denied, 314 U. S. 706; cf. *United States* v. *Sullivan*, 274 U. S. 259, 263–264; see *Ryan* v. *Amazon Petroleum Corp.*, 71 F. (2d) 1, 8 (C. C. A. 5), reversed on another ground, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

keeping records or making reports that the law requires. The making of a record or report may be properly compelled by a law previously in existence which serves administrative purposes and is not directed to the production of incriminating evidence as such, even though after being made the record or report becomes public property to which no constitutional privilege attaches although it turns out to have a bearing upon a subsequent charge of crime.[22] The present case,

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[22] *Ule* v. *State*, 208 Ind. 255 (1935); *State* v. *Cummins*, 76 Ia. 133, 136 (1888); *State* v. *Smith*, 74 Ia. 580, 584 (1888); *People* v. *Rosenheimer*, 209 N. Y. 115, 120 (1913); *State* v. *Donovan*, 10 N. D. 203 (1901); *United States* v. *Mulligan*, 268 Fed. 893 (N. D. N. Y.); *United States* v. *Dalton*, 286 Fed. 756, 757 (W. D. Wash.); see *Wilson* v. *United States*, 221 U. S. 361, 380–382; 8 Wigmore, *Evidence* (3d ed., 1940), sec. 2259, pp. 349–352: "The duty, or compulsion, is directed * * * to the generic class of acts, not to the criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty. * * * The generalization, therefore, may be made, that *there is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting.* Such records therefore are not protected by the present privilege against self-incrimination. * * * The foregoing logic leads to the same result where the report required by law to be made is *oral* only; *e.g.*, those laws which require a person whose *vehicle*, machinery, or other property has *caused an injury, to make an oral disclosure* to an official, at the *time*, of his name and address or of other circumstances of the injury. The *logic* is the same; for here also the purpose is administrative, the duty applies to a generic class of acts, irrespective of the criminality of any particular one (and

on the assumption that the testimony was in fact compelled, should be governed by the same principles. Petitioner was under a statutory duty in New York to supply information in aid of his judgment creditors. This duty was anterior to and independent of the criminal conduct of which he now stands convicted; it related to a generic class of acts and not to criminal conduct as such; the disclosure of crime was not the purpose of the proceeding but was only the incidental result; there is no suggestion of collusion between petitioner's judgment creditors and the United States Attorney; petitioner's testimony was in effect an oral report which became the property of the state of New York; and we submit, he has no federal constitutional privilege against the production, by process not directed to him, of the document, not belonging to him or in his possession, which contains such testimony. To reach a contrary conclusion would be, we submit, to exalt the privilege against self-incrimination, without justification in reason or authority, to a hitherto unattained pinnacle, at the expense of

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it is certain that only an occasional one will involve criminality); and the duty exists anterior to the whole series of acts so that the possible criminality is due to the party's own election, and the duty is independent of it. That the report may in a given case be later used in a criminal proceeding, and that such a possible use was foreseen by the legislator, does not alter the fact that the duty existed prior to and independent of the criminality." [Italics the author's.]

the public interest in the proof of crime by trustworthy evidence legally procured."

It follows that, even though the case be viewed as presenting the specific question of the admissibility at a federal criminal trial of incriminating testimony secured from the defendant under the compulsion of a state immunity statute, the decision of the majority below is nonetheless correct.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

CHARLES FAHY,
Solictor General.

TOM C. CLARK,
Assistant Attorney General.

CHESTER T. LANE,
EDWARD G. JENNINGS,
Special Assistants to the Attorney General.

DECEMBER 1943.

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[a] Citing this Court's decision in *Heike* v. *United States*, 227 U. S. 131, the court in *People* v. *Lorch*, 13 N. Y. S. (2d) 155, 160–161 (Court of General Sessions, New York County, 1939), construes an immunity statute strictly and states: "While the court has no concern with the wisdom or propriety of legislation, it should not strain to reach a result, fraught with so serious and grave a danger to the due administration of the criminal law."

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SUPREME COURT OF THE UNITED STATES.

No. 193.—October Term, 1943.

Samuel Feldman, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 29, 1944.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an indictment under Section 215 of the Criminal Code, 18 U. S. C. § 338, for using the mails to further a fraudulent scheme. Petitioner's conviction was affirmed by the Circuit Court of Appeals, one judge dissenting. 136 F. 2d 394. We brought the case here, 320 U. S. 724, to consider the single question whether the admission of testimony previously given by petitioner in supplementary proceedings in a state court deprived him of the protection of the Fifth Amendment against being "compelled in any criminal case to be a witness against himself".

In accordance with New York procedure, known as supplementary proceedings, designed to aid in the discovery of assets of a debtor, N. Y. Civil Practice Act, art. 45, Feldman, a judgment debtor, was called as a witness in such proceedings on several occasions between March 31, 1936, and September 29, 1939. Up to March 14, 1938, the New York immunity statute merely provided that a debtor might not be excused from testifying because of self-crimination but that his testimony could not be used in evidence in a subsequent criminal proceeding against him. N. Y. Laws, 1935, c. 630, § 789. By an Act of March 14, 1938, New York broadened the debtor's immunity so as to free him from prosecution on account of any matter revealed in his testimony. N. Y. Laws, 1938, c. 108, § 17; N. Y. Civil Practice Act, § 789. While the earlier provision was in effect, Feldman testified that he was unemployed, paid rent of $250 a month from funds supplied by his family, owed about $340,000 and contemplated immediate bankruptcy. He further testified that about once a month his father sent him a book of signed checks, he sent large sums of money to

his father by Western Union and destroyed whatever evidence the receipts might offer—in short, that he was "kiting" his father's checks by sending the proceeds of the later checks to cover those cashed earlier. After March 14, 1938, and down through September, 1939, Feldman again testified in New York supplementary proceedings, giving further details of his bizarre "kiting" practices.

The federal charge was the use of the mails in a scheme to defraud executed by "kiting" checks. In the trial, the Government introduced Feldman's testimony in the New York supplementary proceedings. He did not take the stand. The Government contends that it is unnecessary to decide whether the claim of privilege duly made bars the admission of this testimony. It suggests that testimony given prior to the Act of March 14, 1938, was not compellable and therefore Feldman waived any privilege, in that the New York statute prior to March 14, 1938, did not grant an immunity coextensive with the privilege available under New York law. *People ex rel. Lewisohn* v. *O'Brien*, 176 N. Y. 253. As to testimony under the later New York statute, the Government suggests that it either was not incriminating or was merely repetitive of the earlier voluntary testimony, making its admission in any event not prejudicial.

We put to one side all these subtler issues because we think they cannot dispose of the case. And so we come directly to the main question, namely whether the Fifth Amendment prohibited the admission against Feldman upon his trial in a federal court of the earlier testimony given by him in the state courts. While the point has not been formally decided, we deem the answer to be controlled by a long series of decisions expressing basic principles of our federation.

The effective enforcement of a well designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed. We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy. "The efforts of the courts and

See Boyd v. United States 116 U.S. 616, 630.

their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles [of the Fourth and Fifth Amendments] established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." *Weeks* v. *United States*, 232 U. S. 383, 393. "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd* v. *United States*, ~~116 U. S. 616, 633~~, supra, at 633.

But for more than one hundred years, ever since *Barron* v. *Baltimore*, 7 Pet. 243, one of the settled principles of our Constitution has been that these Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit. *Brown* v. *Walker*, 161 U. S. 591, 606; *Jack* v. *Kansas*, 199 U. S. 372, 380; *Twining* v. *New Jersey*, 211 U. S. 78. Conversely, a State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere. The distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system, howsoever complicated and difficult the practical accommodations to it may be. The matter was put in classic terms in what Chief Justice Taft called "the great judgment", *Ponzi* v. *Fessenden*, 258 U. S. 254, 261, of Chief Justice Taney in *Ableman* v. *Booth*, 21 How. 506, 516: "the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the

judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye."

This principle has governed a series of decisions which for all practical purposes rule the present case. When this Court for the first time sustained an immunity statute as adequate, it rejected the argument that because federal immunity could not bar use in a state prosecution of testimony compelled in a federal court, the immunity falls short of the constitutional requirement. *Brown* v. *Walker, supra* at 606. And when the reverse claim was made as to a state immunity statute, that a disclosure compelled in a state court could not assure immunity in a federal court, the argument was again rejected because "The state [anti-trust] statute could not, of course, prevent a prosecution of the same party under the United States [anti-trust] statute, and it could not prevent the testimony given by the party in the State proceeding from being used against the same person in a Federal court for a violation of the Federal statute, if it could be imagined that such prosecution would be instituted under such circumstances." *Jack* v. *Kansas, supra* at 380. When the matter was here last it was thus summarized: "This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination." *United States* v. *Murdock*, 284 U. S. 141, 149.

And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution. *Weeks* v. *United States, supra*; *Gouled* v. *United States*, 255 U. S. 298; *Agnello* v. *United States*, 269 U. S. 20, incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution. *Burdeau* v. *McDowell*, 256 U. S. 465. Relevant testimony is not barred from use in a criminal trial in a federal court unless wrongfully acquired by federal officials. "If

knowledge of them [the facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it . . . ." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392. This Court has refused to draw nice distinctions as to when wrongful acquisition of evidence by state agencies was also a federal enterprise. When a representative of the United States is a participant in the extortion of evidence or in its illicit acquisition, he is charged with exercising the authority of the United States. Evidence so secured may be regained, *Go-Bart Co.* v. *United States*, 282 U. S. 344, and its admission, after timely motion for its suppression, vitiates a conviction. *Byars* v. *United States*, 273 U. S. 28.

The Constitution prohibits an invasion of privacy only in proceedings over which the Government has control. There is no suggestion of complicity between Feldman's creditors and federal law-enforcing officers. The Government here is not seeking to benefit by evidence which it extorted. It had no power either to compel testimony in the state court or to forestall such disclosure as a means of avoiding possible interference with the enforcement of the federal penal code. Whether testimony in a New York court should be compelled in exchange for immunity from prosecution under the penal laws of New York is for New York to say. For what purposes the United States may deem the disclosure of testimony more important than prosecution for federal crimes is for Congress to say. It has seen fit to make the exchange very sparingly. See *United States* v. *Monia*, 317 U. S. 424. Certainly it is not for New York to determine when, because it suits its local policy to employ testimonial compulsion, it will relieve from federal prosecution "for or on account of any transaction, matter or thing concerning which" a New York court may have seen fit to require testimony. Such would be the practical result of sustaining petitioner's claim. The immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction. Otherwise the criminal law of the United States would be at the hazard of carelessness or connivance in some petty civil litigation in any state court, quite beyond the reach even of the most alert watchfulness by law officers of the Government. See Nardone v. United States, 308 U. S. 338.

Only a word need be said about the phrase of scepticism in *Jack* v. *Kansas, supra* at 380, that it could hardly be imagined "that such prosecution would be instituted under such circumstances." The "prosecution" and the "circumstances" there referred to were a prosecution on the same facts for violation of the state and the federal anti-trust laws. But see *Fox* v. *State of Ohio*, 5 How. 410, 435; *United States* v. *Lanza*, 260 U. S. 377. The cautionary words in *Jack* v. *Kansas* in nowise qualified the principle of that and later cases as to the separateness in the operation of state and federal criminal laws and state and federal immunity provisions. There are, as we have already seen, ample safeguards. If a federal agency were to use a state court as an instrument for compelling disclosures for federal purposes, the doctrine of the *Byars* case, *supra*, as well as that of *McNabb* v. *United States*, 318 U. S. 332, afford adequate resources against such an evasive disregard of the privilege against self-crimination. Nothing in this record brings either doctrine into play.

Judgment affirmed.

Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice BLACK, dissenting.

In *Boyd* v. *United States*, this Court said that "any compulsory discovery by extorting the party's oath . . . is contrary to the principles of a free government. It is abhorrent . . . to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." 116 U. S. 616, 631-632.[1] Unless the Court now is disavowing this belief, the use of testimony obtained by compulsory discovery to convict an accused must be

[1] And, see Jack v. Kansas, 199 U. S. 372, where this Court disposed of an argument that a Kansas statute unconstitutionally compelled Jack to confess his violations of a federal criminal statute with the assertion that, "We do not believe . . . such evidence would be availed of by the Government for such purpose." *Id.*, 381-382. In an earlier case, Brown v. Walker, 161 U. S. 591, this Court thought that the likelihood that state prosecutors would use testimony compelled by the federal government was "so improbable that no reasonable man would suffer it to influence his conduct." *Id.*, 606-608. But see Ensign v. Pennsylvania, 227 U. S. 592.

See United States v. Saline Bank, 1 Pet. 100; United States v. McRae, L. R. 3 Ch. App. 79.

considered "shocking to the universal sense of justice" and "offensive to the common and fundamental ideas of fairness and right", and therefore, under past decisions of the Court, incompatible with Constitutional due process of law. *Betts* v. *Brady*, 316 U. S. 455, 462, 473. Or at least, even if the use of testimony extracted by compulsory discovery be held consistent with due process, adherence to the belief expressed by the *Boyd* case should require the Court to hold that, absent a conflicting Act of Congress, "a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence" so obtained. *McNabb* v. *United States*, 318 U. S. 332, 347. But I do not base my dissent upon judicially defined concepts of procedural due process or upon judge-made rules of evidence. The Bill of Rights, proposed in 1789 by the First Congress convened under our Constitution, and quickly ratified by the States in 1791, declares in part that, "No person . . . shall be compelled in any Criminal Case to be a witness against himself." Amend. V, Constitution of the United States. Never since the Bill of Rights was adopted, until today, has this Court sustained a single conviction for a federal offense which rested on self-incriminatory testimony forced from the accused. I cannot agree to do so now.

Feldman was compelled to testify under oath in a creditors' compulsory discovery proceeding in a New York court conducted pursuant to a state statute which granted him immunity from state prosecution for any state crime he might be forced to confess. Had he refused to testify he could have been imprisoned. Over his objection, a transcript of his compelled testimony was used in the United States District Court to convict him of a federal crime. As the Fifth Amendment heretofore has been interpreted, Feldman's testimony could not have been used for this purpose had it been compelled by a federal court rather than the state court.[2] This would have been true whether the federal court proceeding had been non-criminal or criminal,[3] and whether Feld-

[2] McCarthy v. Arndstein, 266 U. S. 34; and see Bram v. United States, 168 U. S. 532; Wan v. United States, 266 U. S. 1; cf. Boyd v. United States, 116 U. S. 616.

[3] McCarthy v. Arndstein, *supra*, Note 2, pp. 40-41; Counselman v. Hitchcock, 142 U. S. 547, 562. See also United States *ex rel.* Bilokumsky v. Tod, 263 U. S. 149; United States *ex rel.* Vajtauer v. Comm'r of Immigration, 273 U. S. 103.

man had testified as a mere witness or as a defendant.[4] Nor could his forced testimony have been used had it been compelled by federal officers outside of a court room;[5] by foreign detectives in a foreign country inquiring into commission of an offense against the United States committed on the high seas;[6] or by state officers interrogating a suspect for the purpose of enforcing a federal law.[7] There is, then, no sanction in the precedents of this Court for viewing the Fifth Amendment's prohibition against compelled testimony with grudging eyes and reducing its scope to the narrowest plausible limits. As the decisions reflect, the previously declared attitude of the Court toward this prohibition has been that it "must have a broad construction in favor of the right which it was intended to secure." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562; *McCarthy* v. *Arndstein*, 266 U. S. 34.

Today, however, the Court adopts a different approach to the task of construing the Fifth Amendment. We are now told that under certain circumstances compelled testimony is purged of the fatal taint which the Fifth Amendment places upon it, and that an accused can be convicted in a federal court on words he was forced to speak. The circumstances under which it is now held that men can be forced to convict themselves by their own testimony are, (1) that the testimony was compelled by state officers, and (2) that the state officers were not acting to enforce federal law. These slight variations in the techniques of compulsion are considered a sufficient excuse to escape the Fifth Amendment's command against the use of compelled testimony by federal courts. Surely such a holding is not to be justified by the language of that Amendment. Within its sweeping prohibition are found no exceptions based upon the persons who compel, their purpose in compelling, or their method of compelling, whether by threats of imprisonment, physical torture, or other means. Testimony is no less compelled because a state rather than a federal officer compels it, or because the state officer appears to be primarily interested at the moment in enforcing a state rather than a federal law.

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[4] Counselman v. Hitchcock, 142 U. S. 547.

[5] Wan v. United States, *supra*, Note 2; Anderson v. United States, 318 U. S. 350, 356.

[6] Bram v. United States, *supra*, Note 2;

[7] Anderson v. United States, *supra*, Note 5; and see Bram v. United States, *supra*, Note 2.

Nor is the holding in this case to be defended as one which our federal system requires. This case presents no conflict between federal and state spheres of power such as that presented by cases involving the validity of federal and state immunity statutes, wherein it has been contended, unsuccessfully, that neither the United States nor a State can compel a witness to testify against himself unless it grant him complete immunity from prosecution in both jurisdictions.[8] Feldman's objection to the use of his compelled testimony is not based on a claim that New York must grant him, or has granted him, immunity from prosecution for the federal crime it has forced him to confess. He does not question the power of the United States to prosecute him for that crime on proper evidence. Nor, for that matter, does he contend that the Fifth Amendment prevented New York from compelling him to confess a federal crime.[9] He claims only that the Fifth Amendment's prohibition against self-incrimination prevents the use of his compelled testimony against him in the present proceeding. The very narrow problem thus presented, and upon which this Court never before has passed, is whether federal courts can convict a defendant of a federal crime by use of self-incriminatory testimony which someone in some manner has extracted from him against his will. The Court's holding that a defendant can be so convicted cuts into the very substance of the Fifth Amend-

[8] See Hale v. Henkel, 201 U. S. 43, and United States v. Murdock, 284 U. S. 141, holding it enough that the United States grant immunity from prosecution for federal crimes; but see, *contra*, United States v. Saline Bank, 1 Peters 100; Ballmann v. Fagin, 200 U. S. 186. Had the Court in the *Murdock* case, *supra*, accepted the contention that the federal government must grant an immunity from state as well as federal prosecution, it would inevitably have been faced with the problem of the federal power to interfere with enforcement of state laws through the device of granting immunity from state prosecution to witnesses in federal proceedings—a problem replete with both practical and legal difficulties. See J. A. C. Grant, Immunity From Compulsory Self-Incrimination In A Federal System of Government, 9 Temple L. Q. 57 and 194, 207-211.

Compare Jack v. Kansas, *supra*, Note 1, holding that Kansas could compel a witness to testify to his past crimes upon a grant of immunity from state prosecution, though he still be subject to federal prosecution. In reaching this result the Court took specific notice of the fact that, were the rule otherwise, state immunity statutes must all be stricken down. "The state statute could not, of course, prevent a prosecution of the same party under the United States statute." 199 U. S. 372, 380.

[9] See Twining v. New Jersey, 211 U. S. 78, and Ensign v. Pennsylvania, *supra*, Note 1, holding respectively that despite the Fourteenth Amendment a state may compel a defendant to incriminate himself, and may use against him schedules he filed in an involuntary federal bankruptcy proceeding. But see Asheraft v. Tennessee, No. 391, decided May 1, 1944.

ment. And it justifies this result not by the language or history of the Constitution itself, but by a process of syllogistic reasoning based upon broad premises of "dual sovereignty" stated in previous opinions of the Court relating to immunity statutes. Even were there here a "dual sovereignty" problem, which there is not, such a method of decision would be questionable. Constitutional interpretation should involve more than dialectics. The great principles of liberty written in the Bill of Rights cannot safely be treated as imprisoned in walls of formal logic built upon vague abstractions found in the United States Reports. "The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, concurring opinion, 487, 491-492.[10]

Putting aside the Court's dialectical method of interpretation, and examining the history and purpose of the Fifth Amendment, there appears to be no justification for reducing its scope as the Court is now doing. Compulsion of self-incriminatory testimony by court oaths and by the less refined methods of torture were equally detested by the Fifth Amendment's liberty-loving advocates and their forbears.[11] Their abhorrence of these practices did not spring alone from a predilection for personal privacy. They had other reasons to despise and fear them. They still remembered the hated practices of the Court of Star Chamber, the Court of High Commission, and other inquisitorial agencies which had brought religious and political non-conformists within the penalties of the law by means of their own testimony. And history supports no argument that the framers of the Fifth Amendment were interested only in forbidding the *extraction* of an accused's testimony as distinguished from the *use* of his extracted testimony. The extraction of testimony is, of course, but a means to the end of its use to punish. Few persons would seriously object to testifying unless their testimony would subject them to future punishment. The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled

[10] For a critical analysis of the conflict between the legal concept of "dual sovereignty" and preservation of the Constitutional prohibition against self-incrimination, see J. A. C. Grant, *op. cit., supra*, Note 8.

[11] See Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763, 775-783.

testimony to punish him. By broadly outlawing the practice of compelling such testimony the Fifth Amendment struck at this evil at its source, seeking to eliminate the possibility that compelled testimony would ever be available for use to punish a defendant.[12]

Perhaps, as some have argued, the men who framed this Amendment were mistaken or their fears have lost foundation and the unqualified prohibition against the extraction and use of compelled testimony which they put into the Fifth Amendment should be repealed or modified.[13] This view of the desirability of constricting the Fifth Amendment I am not ready to accept, but were it otherwise I would not consider such a view should play any part in the process of interpretation. I am unwilling to see any constriction of the liberties and the procedural safeguards of these liberties specifically enumerated in the Bill of Rights unless it be by Constitutional amendment.[14]

The prohibition against compelled testimony which the Court today has seen fit to restrict cannot be dissociated from the other specific protections afforded the individual by the Bill of Rights. The founders of our federal government were too close to oppressions and persecutions of the unorthodox, the unpopular, and the less influential to trust even elected representatives with unlimited powers of control over the individual. From their distrust was derived the first ten amendments, designed as a whole to "limit and qualify the powers of Government", to define "cases in which the Government ought not to act, or to act only in a particular mode", and to protect unpopular minorities from oppressive majorities. 1 Annals 437. The first of the ten amendments erected a Constitutional shelter for the people's liberties of religion, speech, press, and assembly. This amendment reflects the faith that a good society is not static but advancing, and that

[12] See United States v. Burr, 25 Fed. Cas. 38-41; Counselman v. Hitchcock, 142 U. S. 547, 564-566; Brown v. Walker, 161 U. S. 591, 594, 600, 605-606; cf. Ex parte Lange, 18 Wall. 163, 173. And see Pittman, *op. cit.*, *supra*, Note 11; and cases cited Notes 5, 6, and 7, *supra*.

[13] Compare Knox, Self-Incrimination, 74 Univ. Pa. L. Rev. 139 with VIII Wigmore on Evidence, Third Ed., pp. 304-313; and see Editorial, 1 Journ. Crim. Law and Crim. 165-166.

[14] See dissenting opinion of Circuit Judge Frank, in United States v. St. Pierre, 132 F. 2d 837, 840, pp. 847-848. "Strangely enough, those who are most opposed to any changes in judicial constructions of those designedly elastic clauses of the Constitution are often the most vigorous in their demands that the courts should eviscerate the specific and relatively inelastic self-incrimination clause." *Id.*, 848.

the fullest possible interchange of ideas and beliefs is essential to attainment of this goal. The proponents of the First Amendment, committed to this faith, were determined that every American should possess an unrestrained freedom to express his views, however odious they might be to vested interests whose power they might challenge.

But these men were not satisfied that the First Amendment would make this right sufficiently secure. As they well knew, history teaches that attempted exercises of the freedoms of religion, speech, press, and assembly have been the commonest occasions for oppression and persecution. Inevitably such persecutions have involved secret arrests, unlawful detentions, forced confessions, secret trials, and arbitrary punishments under oppressive laws. Therefore it is not surprising that the men behind the First Amendment also insisted upon the Fifth, Sixth, and Eighth Amendments, designed to protect all individuals against arbitrary punishment by definite procedural provisions guaranteeing fair public trials by juries. They sought by these provisions to assure that no individual could be punished except according to "due process", by which they certainly intended that no person could be punished except for a violation of definite and validly enacted laws of the land, and after a trial conducted in accordance with the specific procedural safeguards written in the Bill of Rights.[15] If occasionally these safeguards worked to the advantage of an ordinary criminal, that was a price they were willing to pay for the freedom they cherished. And one of the specific procedural safeguards which they inserted to shield the individual was the prohibition against compulsion of self-incriminatory testimony.

It is impossible for me to reconcile today's restrictive interpretation of the prohibition against compelled self-incrimination with the principle of broad construction which this Court heretofore has deemed essential to full preservation of the basic safeguards of liberty specifically enumerated in the Bill of Rights. The protections explicitly afforded the individual by the Bill of Rights represent a large part of the characteristics which distinguish free from totalitarian government. Under our Constitutional system the privileges it embodies and the rights it secures

[15] See Chambers v. Florida, 309 U. S. 227, 235-238; Tot v. United States, 319 U. S. 463, 473.

were intended to be above and beyond the power of any branch of government to mutilate or destroy. We have no assurance that the fears of those who drafted and adopted our Bill of Rights were groundless, nor that the reasons for those fears no longer exist. Ancient evils historically associated with the possession of unqualified power to impose criminal punishment on individuals have a dangerous habit of reappearing when tried safeguards are removed.

This case involves the Fifth, not the Fourth, Amendment. Decisions which have read the Fourth and Fifth Amendments together for the purpose of broadening the Fourth Amendment should not now be employed to narrow the Fifth Amendment. To do so ignores the particular reasoning of these decisions as well as the separate language and history of the two Amendments. See *Boyd* v. *United States, supra; Counselman* v. *Hitchcock, supra; Brown* v. *Walker*, 161 U. S. 591; VIII *Wigmore on Evidence*, Third Ed. pp. 276-304, 368. Nothing this Court has said with regard to the Fourth Amendment requires that we now open the door which the Fifth Amendment in 1791 closed to compelled self-incrimination.

I would reverse the judgment.

Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE join in this opinion.